TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. [redacted]152

J. E. RALEY & BROTHERS, H. S. PRATER & COMPANY, THEO. W. MARTIN, *ET AL.*, PLAINTIFFS IN ERROR,

vs.

W. S. RICHARDSON, TAX COLLECTOR OF FULTON COUNTY, AND WILLIAM A. WRIGHT, COMPTROLLER GENERAL FOR THE STATE OF GEORGIA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF GEORGIA.

FILED NOVEMBER 16, 1922.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 698.

J. E. RALEY & BROTHERS, H. S. PRATER & COMPANY, THEO. W. MARTIN, *ET AL.*, PLAINTIFFS IN ERROR,

vs.

W. S. RICHARDSON, TAX COLLECTOR OF FULTON COUNTY, AND WILLIAM A. WRIGHT, COMPTROLLER GENERAL FOR THE STATE OF GEORGIA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF GEORGIA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 24, 1923.

1

Writ of Error.

[Filed Oct. 11, 1922.]

UNITED STATES OF AMERICA, *ss:*

[Seal of U. S. District Court, N. D. Georgia.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Georgia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between J. E. Raley & Brothers et al., plaintiffs in error, and W. S. Richardson, tax collector, et al., defendants in error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised, under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein any title, right, privilege, or immunity was
2 claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision was against the title, right, privilege, or immunity especially set up or claimed under such Constitution, treaty, statute, commission, or authority; a manifest error hath happened to the great damage of the said J. E. Raley & Brothers et al., as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Wm. H. Taft, Chief Justice of the United States, the tenth day of October, in the year of our Lord one thousand nine hundred and twenty-two. Olin C. Fuller, Clerk United States District Court, Northern District of Georgia. [Seal of U. S. District Court, N. D. Georgia.]

Allowed by Wm. H. Fish, Chief Justice of the Supreme Court of the State of Georgia.

[File endorsements omitted.]

3 **Order Allowing Writ of Error, etc.**

[Filed Oct. 11, 1922.]

In the Supreme Court of the State of Georgia.

[Title omitted.]

The above entitled cause coming on to be heard, upon the petition of J. E. Raley & Brothers, et al., for writ of error from the Supreme Court of the United States to the Supreme Court of the State of Georgia, and upon examination of said petition and the record in said cause, it is ordered that a writ of error be and the same is hereby allowed to this Court from the Supreme Court of the United States, said writ of error to operate as a supersedeas, and the bond for that purpose is hereby fixed at the sum of $500.00, dated at Atlanta, Georgia, this the 10th day of October, A. D., 1922. Wm. H. Fish, Chief Justice of the Supreme Court of the State of Georgia.

[File endorsement omitted.]

4 **Citation and Service.**

[Filed Oct. 11, 1922.]

In the Supreme Court of the State of Georgia.

UNITED STATES OF AMERICA, *ss:*

To W. S. Richardson, Tax Collector of Fulton County, and William A. Wright, Comptroller General for the State of Georgia, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington, within thirty days from the date hereof, pursuant of a writ of error, filed in the Clerk's office of the Supreme Court of the State of Georgia, wherein J. E. Raley & Brothers, et al., is plaintiff in error, and you are defendant in error, to show cause, if any there *by*, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable William H. Fish, Chief Justice of the Supreme Court of the State of Georgia, this 10th day of October, in the year of our Lord, One Thousand Nine Hundred Twenty-two. Wm. H. Fish, Chief Justice of the Supreme Court of the State of Georgia.

Due and legal service of the within citation hereby acknowledged, and copy received. All other and further service hereby waived. This the 11th day of October, 1922. Geo. M. Napier, Seward M.

Smith, Frank Carter, Attorneys for W. S. Richardson, Tax Collector, and William A. Wright, Comptroller General.

Filed in office Oct. 11, 1922. Z. D. Harrison, C. S. C., Ga.

5 In the Supreme Court of the State of Georgia.

[Title omitted.]

Petition for Writ of Error.

[Filed Oct. 11, 1922.]

To the Honorable William H. Fish, Chief Justice of the Supreme Court of Georgia:

The petition of J. E. Raley & Brothers, H. S. Prater & Company, Theo W. Martin, and E. E. Smith, respectfully — that heretofore, to-wit, on the 25th day of April, 1922, there was tried in the Superior Court of Fulton, County, before his Honor, Judge W. D. Ellis, one of the Judges of the Superior Court of Fulton County, a case in which the petitioners were plaintiffs, and W. S. Richardson, Tax Collector, and William A. Wright, Comptroller General for the State of Georgia, were defendants.

The declaration was a petition for injunction brought by W. D. Harwell, J. W. Russell, W. S. Rogers & Company, W. J. Neville and Luke Seawell, complainants in Class A, and J. E. Raley & Brothers, H. S. Prater & Company, Theo W. Martin and E. E. Smith as complainants in Class B. Complainants in both classes sought an injunction against defendants restraining the collection of the $100 license tax passed by the General Assembly in the State of Georgia in the year, 1921, affective January 1, 1922. A general demurrer was filed by the defendants, and by consent of counsel the case was heard on the issues made by the demurrer. The court refused the demurrer as to complainants in Class A and made the injunction permanent to the complainants in Class A, but sustained the demurrer and refused the injunction as to the complainants in Class B.

Your petititoners, who were complainants in Class B,
6 alleged in their petition against the defendants in substance, as follows:

1. That they are resident brokers, commission merchants or salesmen representing principals residing outside of the State of Georgia, and also principals within the State of Georgia, and that they sell goods for their principals for a small commission which goods are shipped directly from the principal to the purchaser, and the money is collected by the principal from the purchaser. Complainants allege that they do not represent any other person or firm besides their regular principals, which they represent as agents; that they receive as their compensation a small commission or brokerage, paid to them by the principals after the goods are sold, delivered and paid for. Complainants also allege that a large majority of their business is that of representing non-resident principals,

and that only a small portion of their business is that of representing resident principals.

2. They show that the license tax of $100 imposed by the State of Georgia, is a tax against all of their business, both the business done for non-resident principals and that done for resident principals, and that said tax is a tax on the sale of the goods themselves, and since the majority of their business is that of representing non-resident principals, the tax is an imposition on the goods sold for non-resident principals because said tax is an interference with interstate commerce, and is in violation of Article 1, Section 8 of the Constitution of the United States giving Congress the right to regulate commerce between the States.

3. The petitioners show that the business done by them for resident principals is so small and the compensation derived from said business is so little that the imposition by the State of Georgia of the $100 license tax against that business done for Georgia
7 principals would be excessive, unreasonable, and would amount to the confiscation of the profit accruing to them from the business done for Georgia principals, and would be in substance and effect a denial of the right to sell goods on a commission basis receiving a small brokerage and commission, and that said license tax would be in violation of the Fourteenth Amendment to the Constitution of the United States, Article 14, Section 1, stipulating that no state shall deprive any person of property without due process of law.

4. Petitioners further showed that should the Court hold complainants in class A exempt from paying the license tax, because all of their business was that of representing non-resident principals and was construed by the Court to be inter-state commerce, that the Court would of necessity declare complainants in Class B exempt, because the result of a decision exempting complainants in Class A and holding complainants in Class B liable to the tax would result in a discrimination in favor of the complainants representing non-resident principals against complainants representing some resident principals, and that since all complainants were of the same class said discrimination would be in derogation of the Fourteenth Amendment to the Constitution of the United States, Article 14, Section 1, wherein it is declared that no state shall make or enforce any law which shall deny to any person the equal protection of law.

5. To all of these points made in said petition, the defendants demurred, and as to complainants in Class B, the demurrer was sustained by the trial court and thereafter your petitioners in accordance with the rules of procedure in practice governing such cases in the State of Georgia, duly and regularly carried said cause to the Supreme Court of the State of Georgia, the same being the highest Court in the State which had jurisdiction to review
8 the rulings and judgments of the said Fulton Superior Court, and that on the 18 day of August, 1922, said Supreme Court of the State of Georgia filed an opinion and rendered judgment affirming the ruling and judgment of said Fulton Superior Court, and thereby expressly denied to your petitioners all of the rights, privileges and immunities aforesaid guaranteed to them by the laws of the United States.

Wherefore your petitioners pray for the allowance of a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Georgia, and the Judges thereon to the end that the record in said cause may be removed into the Supreme Court of the United States, and the errors complained of by your petitioners may be examined and corrected, and said judgment be reversed. Your petitioners further pray that they may be permitted to file a bond in accordance with the provisions of law in such sum as your Honor may direct, and thereupon said judgment may be superseded until said cause is determined and decided by the Supreme Court of the United States. J. E. Raley & Brothers, H. S. Prater & Company, Theo. W. Martin, E. E. Smith, By E. B. Weatherly, Their Attorney at Law. Macon, Ga.

[File endorsement omitted.]

9 **Assignment of Errors.**

[Filed Oct. 11, 1922.]

In the Supreme Court of the State of Georgia.

[Title omitted.]

Now comes the plaintiffs in error and respectfully submits that in the record, proceedings, decision, and final judgment of the Supreme Court of the State of Georgia in the above entitled matter there is manifest error in this, to-wit:

1. The Court erred in affirming the judgment of the Superior Court of Fulton County wherein the Court sustained the demurrer to the petition of complainants in Class B, wherein it was argued that the petition showed that in as much as the license tax imposed by the State on complainants who are salesmen representing principals it was in effect a tax imposed on the goods themselves, and since a majority of the business of plaintiffs was that of representing non-resident principals shipping goods from other States into the State of Georgia, and since the license or tax is directed against all of the business of plaintiffs and does not make clear that the tax is against the business done by plaintiffs for principals residing in the State of Georgia, it is therefore a tax imposed by the State on the goods of principals residing outside of the State, as well as against the business done for principals residing in the State, and is in effect an effort on the part of the State to tax inter-state commerce, and is void under Section 8, Article 1, of the Constitution of the United States giving to Congress the exclusive right to regulate trade between the States.

2. The Court erred in affirming the judgment of the Superior Court of Fulton County sustaining the demurrer of defendants to the petition of complainants in Class B in the Court below,
10 wherein it was argued in said petition that should the Court hold that complainants in Class A were exempt from paying the license tax because they were dealing in inter-state commerce,

then complainants in Class B should be held exempt, otherwise the decision of the Court would result in a discrimination in favor of those brokers or commission merchants representing exclusive non-resident principals against those brokers or commission merchants who represent some resident principals for the reason that all brokers are of the same class, and to exempt a part of the class and to hold the other part of the class liable to the tax would deny to the intra-state brokers the equal protection of the laws by the State of Georgia, and woud be in violation of the Fourteenth Amendment to the Constitution of the United States, Article 14, Section 1, wherein it is guaranteed that the state shall give to all of its citizens the equal protection of the laws.

3. The Court erred in affirming the judgment of the Superior Court of Fulton County sustaining the demurrer of defendants to the petition of complainants in Class B in the Court below, wherein it was argued that a large majority of the plaintiffs' business is that of representing non-resident principals, and that a very small part of their business is that of representing principals residing in the State of Georgia; it was further argued that plaintiffs' compensation is a small commission or brokerage derived from the sale of the goods for their principals, and that the business done for resident principals was so small that their compensation would not justify the payment of said license tax not the continuing of plaintiffs in business, and that if the State could not tax that part of their business which is interstate, then to make plaintiffs pay a $100 license tax on the compensation derived from the sale made for resident principals would be unreasonable, excessive and would amount to the confiscation of plaintiffs' property by the State without due
11 process of law, and would violate the Fourteenth Amendment to the Constitution of the United States, Article 14, Section 1, wherein it is guaranteed that no State shall deprive any person of life, liberty, or property without due process of law. E. B. Weatherly, Attorney for Plaintiffs in Error. Macon, Ga.

[File endorsement omitted.]

12 **Bond on Writ of Error.**

[Filed Oct. 11, 1922.]

In Supreme Court of the State of Georgia.

Know all men by these presents, That we, J. E. Raley & Brothers; H. S. Prater & Company; Theo W. Martin, and E. E. Smith, as principals, and National Surety Company, of New York, N. Y., as sureties, are held and firmly bound unto W. S. Richardson, Tax Collector of Fulton County, in the full and just sum of $500.00, to be paid to the said W. S. Richardson, Tax Collector, his certain attorney or successor in office; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and

dated this the 10th day of October, in the year of our Lord, One Thousand Nine Hundred Twenty-two.

Whereas, lately at a term of the Supreme Court of the State of Georgia in a suit pending in said Court, between J. E. Raley & Brothers, H. S. Prater & Company, Theo W. Martin and E. E. Smith, and W. S. Richardson, Tax Collector, and William A. Wright, Comptroller General of the State of Georgia, a judgment was rendered against the said J. E. Raley & Brothers, et al. and the said J. E. Raley & Brothers, et al. having obtained a writ of error and filed a copy thereof in the Clerk's office of said Court to reverse the judgment in the aforesaid suit, and a citation directed to said W. S. Richardson, Tax Collector, et al. citing and admonishing them to be and appear at the Supreme Court of the United States at Washington within thirty days from the date thereof.

Now, the condition of the above obligation is such, That if the said J. E. Raley & Brothers, et al. shall prosecute their writ of error to effect, and answer all damages and costs if it fails to make its plea good, then the above obligation to be void; else to remain in full force and virtue. J. E. Raley & Brothers, H. S. Prather &
13 Company, Theo. W. Martin, E. E. Smith, by E. B. Weatherly (L. S.), Their Attorney at Law. Attest: Ethel Walker, Notary Public, State at Large. My commission expires 5-8-26. (Seal.) National Surety Company, by Harold Bloodworth (L. S.), Resident Vice-President (Harold Bloodworth), by Eunice Elder, Resident Asst. Secretary. Attest: Ethel Walker, Notary Public, State at Large. My commission expires 5-8-26. (Seal.)

Approved by: Wm. H. Fish, Chief Justice of the Supreme Court of the State of Georgia.

[File endorsement omitted.]

11 **Præcipe for Transcript.**

[Filed Oct. 11, 1922.]

In the Supreme Court of the State of Georgia.

[Title omitted.]

The Clerk, in making out a transcript for the writ of error to the Supreme Court of the United States in the above entitled cause, will please include the following parts of the record:

1. The original petition, together with the exhibits thereto;
2. The demurrer of the defendants in the court below, and the judgment sustaining the demurrer as to complainants in Class B, and overruling the demurrer as to complainants in Class A.
3. The exceptions pendente lite to the judgment of the Court sustaining the demurrer of the defendants as to complainants in Class B.
4. The bill of exceptions.
5. The opinion and judgment of the Supreme Court.

6. The petition for writ of error.
7. Order allowing writ of error.
8. Assignments of error.
9. Bond.
10. Original writ of error.
11. Original citations with acknowledgment of service thereon.

E. B. Weatherly, Attorney for Plaintiffs in Error.

15 Due and legal service of the foregoing præcipe hereby acknowledged and copy received. This the 11th day of October, 1922. Geo. M. Napier, Seward M. Smith, Frank Carter, Attorneys for W. S. Richardson, Tax Collector, et al.

[File endorsement omitted.]

16 **Judgment.**

Supreme Court of Georgia.

Atlanta, August 18, 1922.

The Honorable Supreme Court met pursuant to adjournment. The following judgment was rendered:

J. E. Raley & Bros. et al.

v.

W. S. Richardson, Tax Collector, et al.

This case came before this court upon a writ of error from the superior court of Fulton county; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed. All the Justices concur, except Gilbert, J., absent, and Hines, J., disqualified.

Bill of costs, $15.00.

Supreme Court of the State of Georgia.

Clerk's Office, Atlanta.

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia, and that —— —— paid the above bill of costs.

Witness my signature and the seal of said court hereto affixed the day and year last above written. ——— ———, Clerk.

17 Supreme Court.

No. 3264.

[Title omitted.]

Opinion, Hill, J.

By the Court:

1. Where resident brokers, salesmen, or commission merchants represent principals wholly outside of the State and some wholly within the State, and on the business done within the State the salesmen and brokers obtain orders from principals within the State, and the goods so purchased are delivered by the principals in the State directly to the purchaser within the State, and the principals collect the price thereof from the purchaser, such domestic or intrastate business is subject to a reasonable business tax imposed by the legislature.
2. The court did not err in refusing to enjoin the collection of the tax as against the plaintiffs in error named in Class B of the petition.

The general tax act of 1921 (Acts 1921, p. 46, par. 30) contains the following: "Every person, firm, or corporation doing business in this State, who receives or distributes provisions or merchandise, including flour, hay, grain, coal, coke, lumber, brick, or any other article of merchandise shipped to such person, firm, or corporation for distribution on account of the shipper, or who participates in the profits ensuing from or growing out of the sales of such provisions or merchandise as above described, or who invoices such sales, or who collects money therefor, shall be deemed a broker. Every
18 person, firm, or corporation buying or selling for another any kind of merchandise on commission shall be a commission merchant. Every person, firm, or corporation shall pay, for the privilege of transacting the business of a commission merchant or broker in merchandise, $100.00."

William D. Harwell and others filed an equitable petition to enjoin the enforcement of the above portion of the general tax act, on the ground that it is unconstitutional and void. The plaintiffs in this case divide themselves into two classes, to wit, Class A and Class B. William D. Harwell, W. S. Rogers, and J. W. Russell and others, are in Class A; and J. E. Raley & Brothers, H. S. Prater & Company, and others, in Class B, bring the present petition for injunction and relief against W. S. Richardson, tax-collector of Fulton County, and William A. Wright comptroller-general of the State of Georgia. It is alleged that Class A is composed of individuals and firms who represent non-resident persons, firms, or corporations, and who solicit orders for goods from jobbers or wholesale dealers in Atlanta, Georgia, and when the orders are obtained they are sent directly to their non-resident principal or principals. If the order is accepted, the goods are shipped by the non-resident principal or principals to the local jobber or wholesale dealer. Up to the time of

the sale the goods in all instances belong to the non-resident principal or principals, and are shipped to the State of Georgia from other States. In making sales or soliciting orders for the goods complainants in Class A sometimes exhibit samples to the local jobber or wholesale dealer, and sometimes take orders without showing a sample. Unless complainants have been previously authorized to sell at a fixed price, the orders are taken subject to acceptance or rejection by such non-resident principal or principals for goods
19 previously sold and on accepted orders. Plaintiffs in Class A do not represent any local jobber or dealer or resident of Georgia; nor do they represent, or assume to represent, any resident of Georgia, or negotiate any sales of goods for residents of Georgia. Their principals are all residents of other States in the United States, and the goods sold are shipped by such principals from other States to the State of Georgia for delivery to buyers who reside in Atlanta, Georgia, and other places in the State, where they keep samples, stationery, and other articles, but they travel around on foot daily, or frequently, in soliciting orders for goods.

Class B are those individuals or firms who are representatives of both non-resident and domestic persons, firms, or corporations. Plaintiffs in Class B solicit orders for goods from jobbers or wholesale dealers in Atlanta, Georgia, and in other places in Georgia, and have their offices in Atlanta, Georgia, and other places in Georgia; and when such orders are obtained they are sent either to their non-resident or resident principals, the non-resident principals being the houses, firms, or corporations wholly outside of the State of Georgia, and the domestic principals are resident firms, or corporations within the limits of the State of Georgia. If an order is accepted, the goods are shipped by such non-resident or resident principal to the local jobber or wholesale dealer, and up to the time of the sale the goods in all instances belong to the principal. In making sales or soliciting orders for the goods, the complainants sometimes exhibit samples to the local jobber or wholesale dealer, and sometimes take orders without showing samples. Unless complainants have been previously authorized by the principal to sell at a fixed price, the orders are taken subject to acceptance or rejection by such principal who owns the goods. All orders
20 received for goods belonging to principals living outside of the State of Georgia are sent directly to the principal, and the goods are shipped into the State of Georgia by the non resident principal and belong to the non-resident principal until paid for by the purchaser. Complainants in Class B are paid a commission by such principals for goods previously sold on accepted orders. Plaintiffs in Class B do not represent any local jobber or dealer; nor do they represent or hold themselves out as representing any residents of Georgia, except those specific houses, firms, or corporations which they call their principals. A very large percentage of their principals are residents of other States of the United States, and the goods sold are shipped to the State of Georgia from such other States by such principals for delivery to the buyers who reside in Georgia. These complaintants have offices in Atlanta,

Georgia, and other places in said State, where they keep samples, etc., and they travel on foot daily or frequently in drumming or soliciting orders for goods, as above stated. Their principals are specific parties, firms, or corporations. They do not represent the public in general, or negotiate or sell for any residents of Georgia, except those specific houses, firms, or corporations which are their principals. If plaintiffs receive an order for goods which are handled by their non-resident principals, the order is sent directly to the non-resident principal; and if they receive an order for goods for their resident principals, such order is sent directly to the resident principal. Plaintiffs are all residents of the State of Georgia and Fulton County, and are doing a commission business therein. They bring this petition in behalf of themselves and of such others similarly situated, also all others as may choose to come in and join herein, and pray that all such persons may have leave accord-
21 ingly. Plaintiffs allege that the defendants are attempting to collect from plaintiffs, and from every other person similarly situated in the State of Georgia, a license tax of $100; and that W. S. Richardson, one of the defendants, has addressed to plaintiffs and others similarly situated the following notice: "Your special State tax for 1922 as merchandise brokers, amounting to $100.00, is past due. It is very important that you attend to this at once, as I am compelled to make report of same to the comptroller-general. The penalty for not paying this tax is extremely severe." That the defendants claim the right to collect the license tax under the 30th paragraph of the second section of the general tax act of 1921, supra. Plaintiffs in both classes allege that the act is unconstitutional and void as being in violation of art. 1, sec. 8, clause 3, of the constitution of the United States, which gives to Congress the sole right to regulate trade between the States. Plaintiffs in Class B allege that the act is void as to them, should it be declared to be void as to the plaintiffs in Class A, for the reason that the result of the application of the act as to complainants in Class B would be discriminatory against plaintiffs in Class B and in favor of plaintiffs in Class A, etc. It is also alleged that the act is unconstitutional as in violation of art. 7, sec. 2, par. 1, of the constitution of the State of Georgia (Civil Code of 1910, §6553), which says that all taxation shall be uniform upon the same class of subjects, etc. They allege that should the act not apply to resident salesmen representing non-resident principals, it would be discriminatory and arbitrary and unreasonable to cause plaintiffs in Class B to pay the license. There were other allegations in the petition, which it is not necessary to set out. The prayer was that the defendants be enjoined from
22 proceeding against plaintiffs for failure to pay said tax; or from in any way interfering with plaintiffs and persons similarly situated, in the conduct of their business, because of their failure to pay the tax.

A general demurrer to the petition was filed; and the case by agreement was heard by the trial judge without a jury, on the petition and general demurrer. The judge sustained the demurrer as to Class B, and held that Class B was subject to the tax; but held that

Class A was not subject, and made the injunction permanent as to Class A. To this ruling the plaintiffs within Class B excepted.

Hill, J. (after stating the foregoing facts):

It is insisted by the plaintiffs who come within Class B, and whose business was partly interstate and partly intrastate, that the judgment of the court below dissolving the injunction as to them was error, for the reason that the imposition of a license tax against brokers who represent non-resident principals is a tax on interstate business, and is therefore void. It is argued that the tax act under review is directed against all "merchandise brokers" residing within the State of Georgia, whether they represent exclusively non-resident principals, or whether they represent both non-resident and resident principals; and that the plaintiffs in error in Class B represent both non-resident and resident brokers, and that the tax is against all the business which plaintiffs do, and that the act does not distinguish between business done for non-resident principals and that done for resident principals. Therefore it is argued that the license tax by the State on that part of plaintiffs' business which is done for non-resident principals is a tax on interstate commerce, and
23 therefore, void although they do represent some resident principals.

In the case of Kehrer v. Stewart, 117 Ga. 969, it was held: "One who is subject to a specific occupation tax by reason of his conducting, for another, a domestic business within this State, is not rendered exempt from such tax because he also conducts for the same principal other business which is not subject to State taxation." In delivering the opinion of the court in that case Chief Justice Simmons said: "Where property has been brought into a State and has become itself subject to taxation therein, its sale in such State is not commerce between the States, but is purely intrastate. 'While it is exclusively the province of Congress to regulate commerce between the several States, and to protect the same from hostile State legislation, yet when products are shipped from one State and lodged in another, there to be offered for sale in open market, the business of selling them there is no longer interstate commerce, but assumes a domestic character and becomes subject to the laws of taxation of force in the State where such business is pursued. The property involved in the conduct of this business, having become intermingled with the general mass of property in this State, has itself become subject to taxation there; and, upon principle, the business of selling it is alike taxable in that jurisdiction.' Singer Mfg. Co. v. Wright, 97 Ga. 122. Coal shipped from Pennsylvania to New Orleans and there put up for sale 'had come to its place of rest, for final disposal or use, and was a commodity in the market of New Orleans. It might continue in that condition for a year and two years, or only for a day. It has become part of the general mass of property in the State, and as such it was taxable.' Such a tax, when not discriminating against goods the product of other States, is not
24 a regulation of interstate commerce. Brown v. Houston, 114 U. S. 622. See also Emert v. Missouri, 156 U. S. 296,

* * * When goods are brought from one State into another to be offered for sale, and are commingled with the property of the latter, their sale is not interstate commerce, and the power of the Federal government protects them only to the extent of preventing discriminating State legislation which imposes burdens on such goods because of their origin. The statute here involved does not make any discrimination against packing-house products brought in from other States, but imposes the tax upon all agents of packing-houses, foreign or domestic, doing business in this State, whether they deal in products of this or of other States. Petitioner, as managing agent, is conducting two kinds of business. One of these has to do with interstate commerce, and can not be taxed by the State; the other is domestic, and is subject to State taxation." The Kehrer case was taken to the Supreme Court of the United States, and the judgment of the Supreme Court of Georgia was there affirmed. Kehrer v. Stewart, 197 U. S. 60. See also Duncan v. State, 105 Ga. 457 (1).

The principle ruled in the Kehrer case was followed in Smith v. Clark, 122 Ga. 528. Mr. Justice Lamar, in delivering the opinion of the court in that case said: "Smith, as agent of a packing-house was engaged at the same time in two classes of business, one taxable, the other non-taxable. The State statute could not operate to impose a tax upon him for the interstate business, and the interstate clause of the constitution of the United States did not operate to relieve him from liability for tax on the intrastate business. On this branch of the case allegations of the petition were substantially the same as those passed upon in Kehrer v. Stewart, 117 Ga. 969, 25 Sup. Ct. R. 403. It affirmatively appears that meats stored in the warehouse in Augusta was sold in large quantities to cus-
25 tomers in Georgia. This was intrastate business, and when he engaged therein Smith became subject to the tax imposed by paragraph 21, section 2, of the tax act of 1922. He could not relieve himself of this liability because he also sold goods to customers in South Carolina. * * * The statute makes no discrimination between resident and non-resident agents. It imposes no burden upon one that is not imposed upon all others similarly situated, but acts uniformly upon all persons coming within its terms."

The tax act of 1921 (Sec. 2, par. 30) places the tax upon all those coming within its provisions, and taxes both residents and non-residents alike who are doing an intrastate business. Therefore we are of the opinion that there is no unjust discrimination against the plaintiffs. Nor does it deny them the equal protection of the laws. Kehrer v. Stewart, 197 U. S. 60, 61. The State has authority to place a tax on all business within the State, and this is doubtless what the legislature intended by the tax act of 1921. The petition in the present case, with reference to Class B, admits that the plaintiffs are doing an intrastate or domestic business; and taking that to be true on demurrer, we think that the imposition of the tax on those coming within Class B is legal.

From the foregoing authorities we are of the opinion that if goods are shipped into Georgia by a non-resident and are not sold when

shipped into the State, but are stored and afterwards sold; or if goods are purchased by the brokers within the State and sold within the State, in either event this is intrastate, or domestic, business, and is subject to the tax which the legislature has imposed by the act of 1921, and that the legislature did not intend to impose a tax or burden upon interstate business, over which subject congress alone has jurisdiction. Art. 1, sec. 8, par. 2, Constitution United
26 States (Civil Code 1910, § 6644). It will be noted in this connection that plaintiffs cite the case of Stockard v. Morgan, 185 U. S. 27, the first headnote of which is as follows: "Giving to the statute of Tennessee the same meaning that was given it by the Supreme Court of that State, which this court is bound to do, it is held that it violates the interstate commerce clause of the constitution of the United States."

From the foregoing we reach the conclusion that the court did not err in granting the injunction, so far as it related purely to interstate business; and that he did not err also in refusing to enjoin the collection of the tax on business which was purely domestic or intrastate.

Judgment affirmed. All the Justices concur, except Gilbert, J., absent, and Hines, J., disqualified.

27 Supreme Court of Georgia, May Term, 1922.

[Title omitted.]

Injunction, &c.

Bill of Exceptions.

[Filed May 9, 1922.]

Be it remembered, in the case of W. D. Harwell, J. W. Russell, Luke Seawell and W. S. Rogers & Company composing Class A, and J. E. Raley & Brothers, H. S. Prater Company, Theo. W. Martin and E. E. Smith, composing Class B, against W. S. Richardson, as tax collector of Fulton County, and William A. Wright, Comptroller General of the State of Georgia, returnable to the May Term, 1922, of the Superior Court of Fulton County, Georgia, the same being a petition for injunction coming on to be heard before his Honor W. D. Ellis, Judge of the Superior Courts of the Atlanta Judicial Circuit of Georgia, at Chambers, without a jury, on the 25th day of April, 1922, the following proceedings were had, as shown by the record of file in the clerk's office of said county in said case, and is now certified to be true, as follows, to wit:

Upon agreement of counsel, defendants in error filed a general demurrer to complainants petition, and the case was heard before Judge Ellis at Chambers without evidence and without an answer filed by defendants, the issue being made on the general demurrer to the petition.

After argument of counsel, the court overruled the general demurrer and continued the injunction as to Class A in the petition, consisting of W. D. Harwell, J. W. Russell, Luke Seawell, and W. S. Rogers & Company.

The court sustained the general demurrer and refused the injunction as to Class B in the petition, consisting of J. W. Raley & Brothers, H. S. Prater Company, Theo. W. Martin and E. E. Smith, but granted a supersedeas as to complainants in Class
28 B, to which ruling as to Class B, complainants excepted at the time, and do now except and assign same as error, for the following reasons: Because said judgment of the court is contrary to law, in that the pleadings as to Class B clearly show that they are not liable to the tax imposed by the defendants, and the said tax as to them is unconstitutional and void, and therefore, the court erred in sustaining the general demurrer filed by the defendants in error and in refusing to grant the injunction as prayed for in plaintiffs' petition as to Class B. The plaintiffs in error specify as material to a clear understanding of the errors complained of, the following portions of the record, to wit:

1. Plaintiffs' original petition omitting process, service and filing.
2. The defendants' demurrer, omitting filing.
3. The order of the court sustaining the demurrer and refusing the petition as to Class B.

And now comes, J. E. Raley, H. S. Prater & Company, Theo. W. Martin and E. E. Smith, and name themselves as sole plaintiffs in error, and within the period allowed by law, present this their bill of exceptions, naming W. S. Richardson, as tax collector of Fulton County, and William A. Wright as Comptroller General of the State of Georgia, as sole defendants in Error, and pray that the same be assigned and certified, in order that the errors complained of may be considered and corrected.

This the 2nd day of May, 1922. E. B. Weatherly, Attorney for Plaintiffs in Error. Post Office Address: Macon, Georgia.

29 **Order Settling Bill of Exceptions.**

I do certify that the foregoing bill of exceptions is true, and that it specifies all of the record material to a clear understanding of the errors complained of, and the clerk of the Superior Court of Fulton County, Georgia, is hereby ordered to make out a complete copy of such parts of the record in said case as are in this bill of exceptions specified, and certify same as such, and to cause the same to be transmitted to the present term of the Superior Court, that the errors alleged to have been committed may be considered and corrected.

This the 4 day of May, 1922. W. D. Ellis, Judge S. C. A. J. C.

Due and legal service of the within bill of exceptions acknowledged. Copy and all other and further notice or service waived.

This the 4 day of May, 1922. Geo. M. Napier, Seward M. Smith.

Frank Carter, Attorneys for Defendants in Error. Post Office Address: Atlanta, Ga.

[File endorsement omitted.]

30 **Clerk's Certificate.**

GEORGIA,
Fulton County:

I Hereby Certify, That the foregoing Bill of Exceptions, hereunto attached, is the true original Bill of Exceptions in the case stated, to-wit: Wm. D. Harwell, et al., Plaintiff in Error, vs. W. S. Richardson, Tax Collector, Defendant in Error, and that a copy hereof has been made and filed in this office.

Witness my signature and the seal of court affixed this the 27 day of May, 1922. Arnold Broyles, Clerk Superior Court Fulton County, Georgia, ex-Officio Clerk City Court of Atlanta. (Seal.)

[File endorsement omitted.]

31 **Petition for Injunction.**

[Filed Mar. 4, 1922.]

STATE OF GEORGIA,
Fulton County:

To the Superior Court of said County:

1. The complainants in this case are divided into two classes, to-wit, Class A and Class B.

2. Wm. D. Harwell, W. S. Rogers & J. W. Russell and others in Class A, and J. E. Raley & Brothers, H. S. Prater & Company, and others, in Class B, bring this petition and injunction, and pray for process and relief against W. S. Richardson, Esq., Tax Collector of Fulton said State, and against Honorable William A. Wright, Comptroller General for the State of Georgia.

3. Class A is composed of individuals and firms who represent non-resident parties, firms or corporations, and who solicit orders for goods from jobbers or wholesale dealers in Atlanta, Ga., and when said orders are obtained, they are sent direct to their non-resident principal or principals. If the order is accepted, the goods are shipped by said non-resident principal or principals to the local jobber or wholesale dealer. Up to the time of the sale, the goods, in all instances, belong to the non-resident principal or principals, and are shipped to the State of Georgia from other States. In making sales or soliciting orders for the goods, complainants in Class A, sometime exhibit samples to the local jobber or wholesale dealer, and sometime take others without showing a sample. Unless complainants have been previously authorized to sell at a fixed price, the orders are taken subject to acceptance or rejection by such non-resident principal for goods previously sold and on accepted orders.

Complainants do not represent any local jobber or dealer or resident of Georgia, nor do they represent, or assume to represent or

hold themselves out as representing, any resident of Georgia, or negotiate any sales of goods for residents of Georgia. Their prin-
32 cipals are all residents of other states in the United States, and the goods sold are shipped by such principals from other states to the State of Georgia, for delivery to buyers who reside in Georgia.

Complainants have an office in Atlanta, Ga., and other places as is designated in Exhibit "A" in said State, where they keep samples, stationery and other articles, but they travel around on foot daily or frequently in drumming or soliciting orders for goods as above stated. Their principals are specific parties, firms or corporations—all non-residents of Ga., and residents of other States in the United States, and they do not represent the public in general, or negotiate or sell for any resident of Ga.

4. Class B. are those individuals or firms who are representatives of both non-resident and domestic parties, firms or corporations.

Complainants in Class B. solicit orders for goods from jobbers or wholesale dealers in Atlanta, Ga., and in other places in Ga. and have their offices at Atlanta, Ga., and other places in Ga., as designated in Exhibit "B", and when such orders are obtained, they are sent either to their non-resident or resident principals. The non-resident principals being the houses, firms or corporations wholly outside of the State of Ga., and the domestic principals are resident firms, or corporations within the limits of the State of Ga. If an order is accepted the goods are shipped by such non-resident or resident principal or principals to the local jobber or wholesale dealer, and up to the time of the sale, the goods in all instances belong to the principal or principals. In making sales or soliciting orders for the goods, the complainants sometime- exhibit samples to the local jobber or wholesale dealer and sometime-take orders without showing samples Unless complainants have been previously authorized by said principals to sell at a fixed
33 price, the orders are taken subject to acceptance or rejection by such principal or principals who own the goods. All orders received for goods belonging to principals living outside of the State of Ga., are sent direct to said principals and the goods are shipped into the State of Ga., by said non-resident principal and belong to said non-resident principal until paid for by the purchaser. Complainants are paid a commission by such principal or principals for goods previously sold and on accepted orders.

Complainants in Class B. do not represent any local jobber whatever or dealer, nor do they represent or assume to represent, or hold themselves out as representing any resident of Ga., except those specific houses, firms or corporations which they call their principal or principals. A very large percentage of their principals are residents of other states of the United States, and the goods sold are shipped to the State of Ga., from such other states by such principals for delivery to the buyers who reside in Ga.

Complainants have an office in Atlanta, Ga., and in other places as designated in Exhibit "B" in said State, where they keep samples, stationery and other articles, but they travel around on foot daily or

frequently in drumming or soliciting orders for goods as above stated. Their principals are specific parties, firms or corporations—a majority of which reside outside of Ga., and in other States, in the United States, and the others reside in Georgia. They do not represent the public in general, or negotiate or sell for any resident of Ga., except those specific parties firms or corporations which are their principals. In drumming the trade as above described, should complainants receive an order for goods which are handled by their non-resident principals said order is sent direct to the non-resident principal, and should they receive an order for goods for their resident principal, said order is sent direct to the
34 resident principal.

5. Complainants are all residents of the State of Ga. and of Fulton County, and are doing a commission business therein. They bring this petition in behalf of themselves and of such others similarly situated also all others as may choose to come in and join herein, and pray that all such persons may have leave accordingly.

6. For convenience of statement and reference, Exhibit "A" consists of a list of names and addresses of petitioners in Class A. Exhibit "B" consists of a list of names and addresses of petitioners in Class B. Said exhibits are hereto attached and made a part hereof.

7. Complainants aver that the defendants herein as tax collector of said County and said Comptroller General of said State are attempting to impose upon the complainants and collect from your complainants and every other person similarly situated in the State of Ga., a license tax of $100, and that W. S. Richards, Esq., one of the defendants herein has had addressed to complainants and others similarly situated in Fulton County, the following notice:

"Your special State tax for 1922, as merchandise brokers amounting to $100 is past due. It is very important that you attend to this at once as I am compelled to make report of same to the Comptroller General.

The penalty for not paying this tax is extremely severe. Yours truly, W. S. Richardson, Tax Collector."

8. Complainants aver that the said defendants claim the right to collect said license tax under the Thirtieth Paragraph of the Second Section of the General Tax Act of 1921, which said paragraph is as follows:

"Brokers, Merchandise, and Commission Merchants.—Every person, firm or corporation doing business in this State and who
35 receives or distributes provisions or merchandise including flour, hay, grain, coal, coke, lumber, brick or any other article of merchandise shipped to such person, firm or corporation for distribution on account of the shipper, or who participates in the profits ensuing from or accruing out of the sales of such provision or merchandise as above described, or who invoices such sales, or who collects money therefor, shall be deemed a broker. Every person, firm or corporation buying or selling for another any kind of merchandise on commission shall be a commission merchant.

Every person, firm or corporation shall pay for the privilege *or* transacting the business of a commission merchant or broker, in merchandise, $100."

9. Complainants aver that the Comptroller General one of the defendants herein whose duty it is to construe the tax Acts of the General Assembly and to force collection of the same has directed the tax collector Richardson herein to collect the license against the complainants herein, and by said Act it is made a misdemeanor for any person, firm or corporation to buy or sell for another's account any kind of merchandise on commission, without paying a license of $100, and that the said W. S. Richardson declares it to be his purpose to force the same as written, if so directed by the Comptroller General.

10. Complainants aver that they are willing and ready to pay all the taxes that may be legally imposed on them by said State upon all real and personal property owned by the complainants in said State, when said taxes are assessed upon their said property, ad valorem, uniformly and equally on all their property in said State. And do hereby tender and offer to pay the same in the manner and form as aforesaid.

11. Complainants in Class A show that said Act as to them is unconstitutional and void, being in violation of the Inter-State
35 Commerce Clause of the Constitution of the United States, Article One, Section Eight, Clause Three, which Act gives to Congress the sole right to regulate trade between the States. Your complainants in Class A are resident salesmen of Ga., representing non-resident principals and therefore exclusively dealing in Inter-State Commerce, and a license imposed upon complainants in Class A is nothing less than a tax on the Interstate Commodities, which they sell and said tax is void as being in derogation of the Commerce Clause of the United States Constitution.

12. Complainants in Class B are resident salesmen or brokers or commission merchants, who represent both non-resident and resident principals. The complainants in Class B aver that said Act as to them is unconstitutional and void, because in violation of the Interstate commerce clause of the constitution of the United States, Article One, Section Eight, Clause Three, which Act gives to Congess the sole right to regulate trade between the States. Complainants show that although they represent some resident principals a large portion or majority of their business is done with non-resident principals and that the Act itself does not distinguish between the business done with non-resident principals and the business done with resident principals, but imposes a license on complainants who live with- Fulton County, and the State of Ga. Therefore, complainants aver that said Act is repugnant to the Interstate Commerce law and is void as to the complainants in Class B.

Complainants admit that they may be taxed on all local business which they do, but that in the imposition of such tax, the Interstate business must be discriminatory from Interstate business or it must be capable of such discrimination so that it may

37 may clearly appear that Interstate business alone is taxed.
Complainants aver that said Act complained of does not show said discrimination, and is, therefore, void as being in conflict with the Commerce clause of the Constitution. Complainants admit that while under the constitution, Interstate and Intrastate commerce are ordinarily subject to regulation by different sovereignties yet when they are so mingled together with the supreme authority, The Nation; it can not exercise complete and effective control over Interstate commerce without incidental regulation of Intrastate commerce, and complainants show that it would be impossible to separate their Interstate business from their Intrastate business, and that their intrastate business would not furnish sufficient compensation for them to maintain an office or place of business, and that Intrastate business is more or less incidental to their Interstate business.

13. Complainants in Class B aver that said Act is void as to them should it be declared to be void as to the complainants in Class A for the reason that the result of the application of said Act as to complainants in Class B would be discriminatory against complainants in Class B in favor of complainants in Class A, or in other words, if the court should hold that complainants in Class A are exempt by the operation of said Act, because they are dealing in exclusively Interstate commerce, then to hold that the Act is valid as to complainants in Class B would be discriminating in favor of non-residents against residents, and penalizing those complainants who perchance represented some resident principal or principas, and that said discrimination would be void as being in conflict with the Fourteenth Amendment of the Constitution of the United States, which provides that no State shall deny to any person within its jurisdiction the equal protection of the laws.

38 14. Complainants aver that should the court hold the act to be void as to Class A, then said act would be void as to complainants in Class B, because the Act would result in lack of uniformity, and become discriminatory in favor of the complainants in Class A, against complainants in Class B, and therefore, void as to the complainants in Class B, because in violation of the First Paragraph, Second Section of Article Seven of the Constitution of the State of Ga., which says that all taxations shall be uniform and the same on the same class of subjects &c., Therefore, complainants aver that should said Act not apply to resident salesmen representing non-resident principals, it would be discriminatory and arbitrary and unreasonable to cause complainants in Class B to pay said license.

15. Complainants in Class B aver that the said Act would be void as to them should same be void in complainants in Class A for the reason that said Act is capable of receiving but one construction, and that is, that it included every person in Ga., who sells goods on commission or is termed a commission merchant or broker, and that should class A be exempt from paying said license the Section could not apply to complainants in Class B, because it could not be imputed that the General Assembly had a purpose

which was neither expressly nor by implication professed to be in view when the law was enacted. In other words, it would not be legal to construe Section Thirty as including only brokers or salesmen selling goods on commission who have connections with resident principals, because they are subjects of the State for taxation, when it manifestly was the intent of the legislature to include every person in Georgia who sells goods on a commission or as a broker, or commission merchant, and hold that said Act included complainants in Class B, but did not intend to include complainants in Class A. This would not give legislative effect to the real
39 legislative intent, which manifestly was to include every person residing in Ga., who could be termed a commission merchant or broker, or commission salesman, and it cannot appear from said Act that the General Assembly contemplated the passage of an Act having a less comprehensive scope than was indicated which was to include every person in Georgia who could qualify as a commission merchant.

Complainants further aver that said Act cannot be divided in such a way as a expunge the invalid part and leave the valid part standing, because the said invalided part is so interwoven into the scheme of the Act that to eliminate it would cause the legislative scheme to fail and no elimination by the court could be had in a case of this kind, and the whole Act must fall.

Complainants, therefore, aver that said Section would be void as to them should the courts hold that it is void and does not apply to complainants in Class A for the reason that said Act clearly shows that the legislative intent was to put the license tax of $100 on every person residing in Ga., who sells goods on commission or who is termed a commission merchant or broker, whether he represents exclusively non-resident clients or exclusively resident clients or both.

16. Complainants herein further shows that the said alleged license tax is so large as applied to business of this kind and character, that it is impossible for their business to continue at all if said license is to be paid. The purpose of the Act, as applied to said business, therefore, is not in reality a license, but is a prohibition in the guise of a license, and is in substance and effect a denial of the right to conduct at all in the City of Atlanta, and the right to sell goods on a commission basis receiving a small brokerage as compensation. Your complainants are wholly dependent on said occupation for their livelihood. Their compensation is small and to impose a
40 prohibitive license would deprive them of the right to carry on their occupation in the state of Ga. and the said occupation cannot be prohibited, and that a license tax which is in reality because of its amount prohibitive, such as the present tax, is violative of the Fourteenth Amendment of the United States and Section One, Article One, Paragraph Three of the Constitution of Ga., in that it deprives petitioners and persons similarly situated of the liberty of conducting a lawful occupation and of their property interests in said occupation without due process of law.

17. Petitioners, therefore, aver that the collection of said tax would be illegal, and that the enforcement thereof would be illegal,

but that, if petitioners are forced to pay the same, they will be unable to collect the same back from the State, and that contest would involve a multiplicity of suits and circuity of actions, and petitioners, and those similarly situated are without a complete and adequate remedy at law, and that unless the collection of the tax is enjoined, they will suffer irreparable injury.

Wherefore, Petitioners pray that this court will temporarily restrain and permanently enjoin the said defendant, W. S. Richardson, in his capacity as Tax Collector, from enforcing the said tax upon complainants and those similarly situated residing in Fulton County as in this petition described, and from seizing or attempting to seize the property belonging to complainants for the payment of said tax, or from instituting or instigating any proceedings against your complainants for the failure to pay said tax, or from in any way interfering with petitioners and persons similarly situated, in the conduct of their business, because of their failure to pay said alleged tax, and complainants located in Fulton County and those similarly situated throughout the State pray that the Honor-
41 able William A. Wright, Comptroller General, be temporarily restrained, and permanently enjoined from directing that the tax collectors in the various counties in said State cause petitioners and those similarly situated to pay said license or instigating in any form any proceeding against complainants located in said State for failure to pay said tax, or from in any way interfering with complainants and persons similarly situated in the conduct of their occupation or business, because of their failure to pay said alleged license.

Complainants also pray for such other and further relief as may be just and proper in the premises, and that process do issue requiring said defendants to be and appear at the next term of this court to answer this complaint, and that defendants' counsel furnish to complainants' attorney, copy of their pleadings at least three days before said hearing on the restraining order. E. B. Weatherly, Petitioners' Atty.

GEORGIA,
Bibb County:

Personally appeared J. W. Russell & H. S. Prater who on oath says that they are two of the petitioners in the foregoing petition, and that the allegations thereof, where, within their own knowledge are true, and where based on information *they* of others they fully believe to be true. J. W. Russell. Homer S. Prater.

Sworn to and subscribed before me, this 3rd day of March, 1922. I. Leonard Crawford, N. P. Fulton County, Ga.

Order to Show Cause.

Read and considered, sanctioned, ordered filed and served. Let the defendants show cause before the Judge presiding in the motion division of this court at 9.30 A. M. on the 25th day of March 1922

or at such time thereafter as the hearing may be had why
42 the prayers of the petition should not be granted, and until further order of this court the defendants are restrained as prayed for in the petition, and that copy of answer and other pleadings of defendants be furnished to complainants' attorney at least three days before the hearing on the restraining order.

This the 4th day of March 1922. Geo. L. Bell, Judge S. C. A. C.

Exhibit "A" to Petition.

Wm. D. Harwell, Atlanta, Ga. W. S. Rogers, Atlanta, Ga.
J. W. Russell, Atlanta, Ga. W. J. Nevell, Atlanta, Ga.
Luke Sewell, Atlanta, Ga.

Exhibit "B" to Petition.

J. E. Raley & Bros. Atlanta, Ga. H. S. Prater & Co., Atlanta, Ga.
T. W. Martin, Atlanta, Ga. E. E. Smith, Atlanta, Ga.

[File endorsement omitted.]

General Demurrer.

[Filed Apr. 25, 1922.]

GEORGIA,
Fulton County:

And now comes defendants in the above stated case and demur to said petition both generally and specially and for grounds of demurrer alleges:

1. That said petition sets out no cause of action.
2. That the said petition shows on its face that as to Class B that said petitioners are subject to taxes enjoined.
3. That there is no equity in said petition.
4. Defendants demur specially to paragraph 3 of plaintiffs' petition because it does not set out with sufficient particularity
43 the method of doing business of petitioners.

5. Defendants demur specially to paragraph 4 of plaintiff's petition because it does not set out with sufficient particularity the method of doing business of petitioners.

Wherefore defendants pray that said petition be dismissed. Geo. M. Napier Atty. Genl. State of Ga.; Seward M. Smith, Asst. Atty. Gen. State of Ga., Attys. for Wm. A. Wright, Com. Genl. Frank Carter, Atty. for W. S. Richardson, Tax Col.

[File endorsement omitted.]

Order on Demurrer.

Counsel agreeing, in open court, that the above case be heard at this time, on the issue made by the General demurrer to the petition. It is therefore considered, ordered and adjudged, after argument of counsel, that the temporary injunction be continued as to Complain-

ants in Class A, in said petition and the general demurrer as to Class A be and it is hereby overruled.

It is further ordered and adjudged that the injunction heretofore issued be and it is hereby dissolved as to Complainants in Class B, and the general demurrer as to Class B be and it is hereby sustained.

It is further ordered that the complainants in Class B have a supersedeas upon the filing with the Clerk of the Court a bond to be approved by him to the extent of $100.00 for each complainant conditioned upon the payment of the amount of Tax finally adjudicated to be due by said complainants.

In Open Court this the 26th day of April 1922. W. D. Ellis, Judge S. C. A. C.

44 **Clerk's Certificate.**

STATE OF GEORGIA,
County of Fulton:

I hereby certify, that the foregoing pages, hereunto attached, contain a true Transcript of such parts of the record as are specified in the Bill of Exceptions and required, by the order of the Presiding Judge, to be sent to the Supreme Court in the case of Wm. D. Harwell et al., Plaintiff- in Error, vs. W. S. Richardson, Tax Collector, et al., Defendant in Error, I was unable to send up this record in the time prescribed on account of not being able to get the papers in the case.

Witness my signature and the seal of Court affixed this the 27 day of May 1922. Arnold Broyles, Clerk Superior Court Fulton County, Georgia, ex-Officio Clerk City Court of Atlanta. (Seal.)

[File endorsement omitted.]

45 **Clerk's Certificate.**

Clerk's Office, Supreme Court of Georgia.

Atlanta, Ga., Nov. 6, 1922.

I hereby certify that the foregoing pages hereto attached contain the original writ of error, and the original citation, together with true and complete copies of the parts of the record specified in the præcipe in the case of Raley & Bros. et al., plaintiffs in error, vs. W. S. Richardson, Tax-Collector, et al., defendant in error, the same being Case No. 3264, March Term, 1922, of the Supreme Court of Georgia, as appears from the records and files of this office.

Witness my signature and the seal of the Supreme Court of the State of Georgia hereto affixed the day and year first above written. Z. D. Harrison, Clerk Supreme Court of the State of Georgia. (Seal of the Supreme Court of the State of Georgia.)

Endorsed on cover: File No. 29,248. Georgia Supreme Court. Term No. 698. J. E. Raley & Brothers, H. S. Prater & Company, Theo W. Martin, et al., plaintiff in error, vs. W. S. Richardson, tax collector of Fulton County, and William A. Wright, comptroller general for the State of Georgia. Filed November 16th, 1922. File No. 29,248.

IN THE

SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1923

NUMBER 152

J. E. RAILEY & BRO., et al.,
Plaintiffs in Error.

vs.

W. S. RICHARDSON, TAX COLLECTOR, et al.,
Defendants in Error.

BRIEF OF GEO. M. NAPIER, ATTORNEY-GENERAL,
T. R. GRESS, ASSISTANT ATTORNEY-GENERAL
and FRANK CARTER, for Defendants in Error.

STATEMENT OF CASE

This case involves the constitutionality of the tax on merchandise brokers, being the 30th paragraph of the second section of the General Tax Act of 1921, which paragraph reads as follows:

> "Every person, firm or corporation, doing business in this state, and who receives or distributes provisions or merchandise including flour, hay, grain, coal, coke, lumber, brick or any other article of merchandise shipped to such person, firm or corporation for distribution on account of the shipper, or who participates in the profits ensuing from or accruing out of the sales of such pro-

visions or merchandise as above described, or who invoices such sales or who collects money therefor, shall be deemed a broker. Every person, firm or corporation buying or selling for another any kind of merchandise on commission, shall be a commission merchant. Every person, firm or corporation shall pay for the privilege of transacting the business of a commission merchant or broker in merchandise, One Hundred Dollars."

The original plaintiffs in said case were divided into two divisions, known as Class A and Class B. Class A was composed of those who represented principal residing out of the state of Georgia, while Class B included those who represented both non-resident and resident principal.

In the Superior Court of Fulton County, Georgia, this case was heard on a general demurrer to the petition the sole question submitted being one of law, as to whether or not, under the facts alleged, the petition showed the liability of persons comprising Class A and Class B for the tax. The point involved was the constitutionality of such a tax on account of its placing a burden on interstate commerce. The trial Judge sustained the demurrer as to Class B and held that persons comprising Class B were subject to the tax. It was conceded by defendants in error that, under the allegations contained in said petition, persons comprising Class A would not be subject to the tax. Evidence was not introduced as to whether or not persons listed in Class A did, in effect, engage in business in the manner alleged in the petition, this point being left to a further hearing.

BRIEF OF LAW AND ARGUMENT

It is contended by plaintiffs in error that the tax, as to Class B is unconstitutional, because it is in violation of the Interstate Commerce Clause of the Federal Constitution. While admitting that those listed in Class B did some intra-state business, it was contended that because they also did interstate business the tax must fall. It was also contended for those comprising Class B that if the tax was void as to those in Class A the tax would be void as to those in Class B because it would

be a discrimination against them. The theory set out in the pleadings of the plaintiff apparently being that those doing an interstate business could not be taxed because this would be in effect taxing interstate commerce, and, reasoning from that conclusion that those doing an intra-state business could not be taxed because those doing an interstate business could not be taxed. The fallacy of this position of the plaintiff in error is at once apparent on its face.

The attention of the Court is respectfully called to several decisions of the Supreme Court of the State of Georgia, and of the United States which apparently establish the legality of such a tax as that imposed in the instant case. The leading case in Georgia, involving almost the same facts as those alleged in Plaintiff's petition is that of:

KEHRER vs. STEWART, 117 Ga. 699 (4th)

in which the Court say:

> "When goods, the property of a resident of another State are shipped from that State to the owner's place of business in this State, there to be stored and offered for sale in open market by his agent, the business of selling them in this State is not interstate commerce, but is subject to taxation by the State. The Constitution of the United States protects such goods only to the extent of preventing State legislation which imposes on them, because of their origin, burdens which are not imposed upon goods the product of the State imposing such burdens."

Headnote 5 of this decision says:

> "One who is subject to a specific occupation tax by reason of his conducting domestic business within this State, is not rendered exempt from such tax because he also conducts for the same principal business which is not subject to State taxation."

Under the facts alleged in Plaintiff's petition, those in Class B represent both non-resident and domestic parties, firms or

corporations. The fact that they also represent foreign principal will not relieve them from the tax where they also do a domestic business. (See discussion on pages 975-6 and 7 of the above case.)

On the bottom of Page 976 and 977 in this able opinion written by Judge Simmons, he says:

> "The true rule is that when one does any business which is subject to an occupation or privilege tax above stated, he is subject to any tax which the state may lawfully impose thereon, irrespective of whatever other business or occupation he may have. If he would evade the tax, let him avoid the business which is subject to the tax and confine himself to that which is not. If he would continue to pursue the tax business, let him pay the tax which is imposed upon all who are engaged therein."

This case was affirmed by the United States Court in the 197 United States, page 60, and we have not found where it has since been overruled, but in fact, it has been followed by later cases.

In the case of SMITH vs. CLARK, 122 Ga., page 528, the case of KEHRER vs. STEWART is affirmed.

In an able opinion by Judge Lamar, 122 Ga., page 532, is contained the following language:

> "Smith as an agent of a packing house was engaged at the same time in two classes of business, one taxable and the other non-taxable. The state statute could not operate to impose a tax upon him for the interstate business and the interstate clause of the Constitution of the United States did not operate to relieve him from liability for tax on the intrastate business."

A little lower in opinion he says:

> "The statute makes no discrimination between resident and non-resident agents. It imposes no burden upon one that is not imposed upon all others similarly

> situated but acts uniformly upon all persons coming within its terms."

The case at bar likewise places the tax equally upon all coming under its provisions and taxes likewise resident and non-residents doing an intrastate business. Naturally it cannot be so construed as to tax interstate business but the State of Georgia has absolute authority to tax all intrastate business, and this is what the act involved in the present case is attempting to do.

In this connection also see the case of BROWNING vs. WAYCROSS 11th Ga., Appeal, page 46, in which case KEHRER vs. STEWART is cited and approved. The last mentioned case involved a tax upon one for affixing lightning rods, and the tax was upheld even though a tax on one selling lightning rods for a non-resident plaintiff could not be upheld. While the allegations as to Class A do not indicate that such parties are doing an intrastate business, yet if there should be a slight variation in the evidence as to how they are doing business, then the court could very easily decide that the method of doing business by those in Class A was in fact intrastate and in that case they would be subject to the tax involved in this case.

In the case of DUNCAN vs. STATE 105 Georgia, 457, the limitations of interstate commerce are clearly defined. This was another opinion by Chief Justice Simmons. Headnote 1 says:

> "The interstate commerce clause of the Federal Constitution has no application to sales of goods in this state when it appears that the same had been manufactured in another state, shipped in quantities to an agent of the manufacturer residing in Georgia, by him deposited in a warehouse and from thence delivered on retail orders obtained by a travelling agent of the manufacturer."

As to this Class B, plaintiffs admit that they are doing a domestic business, so that apparently there should be no doubt as to the legality of the tax as placed on these parties.

It is interesting to note in this connection the case of PRICE COMPANY vs. CITY OF ATLANTA, 105 Georgia, 358 as to a discussion of what kind of business interstate commerce is.

See in this connection also the case of CHRYSTAL vs. MAYOR AND COUNCIL OF MACON, 108 Georgia, page 270, also 24th Ga. Appeal, page 16, case of ALSPAUGH vs. TOWN OF CADWELL, especially that portion of the opinion contained on page 22 which approves the case of DUNCAN vs. STATE, 105 Ga. 457.

These cases seem to establish the fact that if goods are shipped into Georgia by a non-resident and are not sold when shipped into Georgia but are stored and afterwards sold, then this is intrastate business and subject to taxation.

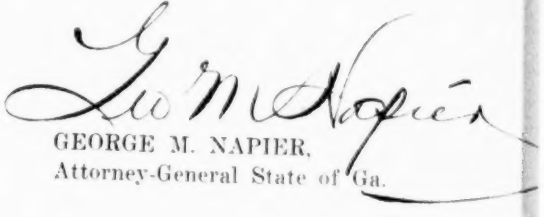
Counsel for plaintiff in error seemed to rely with a good deal of confidence on the case of STOCKETT vs. MORGAN, 185 U. S., page 27, which case is very closely followed by plaintiff in preparation of his petition. This case is good law but has no application to those in Class B. It is interesting to note that the first headnote of this decision is as follows:

> "Giving to the Statute of Tennessee the same meaning that was given to it by the Supreme Court of that state, which this court is bound to do, it is held that it violates the interstate commerce clause of the Constitution of the United States."

It was contended by plaintiff in his argument in the lower court that the State court was controlled by the United States Supreme Court as to constitutional questions. It is interesting to note that this case states that the meaning of the statute as decided by the State Court is controlling as to the interpretation of the statute by the United States Supreme Court. A statute very much like that involved in this case was decided as applying only to intrastate business by previous adjudications in Georgia, and the statute involved in this case should, we believe, receive the same interpretation, and

if this be true, then the tax is clearly maintained as to those in Class B.

Respectfully submitted,



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ATTORNEYS FOR DEFENDANTS IN ERROR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1923

NUMBER 152

J. E. RAILEY & BRO., et al.,
Plaintiffs in Error.

vs.

W. S. RICHARDSON, TAX COLLECTOR, et al.,
Defendants in Error.

IN ERROR OF THE SUPREME COURT OF GEORGIA.

BRIEF FOR PLAINTIFFS IN ERROR.

STATEMENT OF THE CASE.

W. D. Harwell, J. W. Russell, W. S. Rogers & Company, Raley & Brothers, H. S. Prater & Company, Theo. W. Martin, and E. E. Smith, complainants in Class B, filed a petition in the Superior Court of Fulton County for injunction against W. S. Richardson, Tax Collector of Fulton County, and William A. Wright, Comptroller General for the State of Georgia, to the May Term, 1922, of the Superior Court of said County.

Complainants sought an injunction against defendants in error from collecting a license tax, passed by the General Assembly in the year 1921, effective January 1, 1922, which Act reads as follows:

> "Brokers, Merchandise and Commission Merchants. Every person, firm or corporation doing business in this State and who receives for distribtution provisions or merchandise, including flour, hay, grain, coal, coke, lumber, brick, or any other article of merchandise shipped to such person, firm or cor-

poration for distribution on account of the shipper, or who participates in the profits ensuing from or accruing out of the sales of such provisions or merchandise as above described, or who invoices such sales, or who collects money therefor, shall be deemed a broker. Every person, firm or corporation buying or selling for another any kind of merchandise on commission shall be a commission merchant. Every person, firm or corporation shall pay for the privilege of transacting the business of a commission merchant or broker, in merchandise, $100.00."

At the hearing of the restraining order, defendants in error filed a general demurrer, and, by agreement, the case was argued before the court without a jury on the issues made by the general demurrer to the petition.

The Judge overruled the demurrer, and granted an injunction as to complainants in Class A, but sustained the demurrer and dissolved the restraining order as to complainants in Class B; to this ruling plaintiffs in error complained of at the time, and do now allege that same was error.

The ruling of the lower court was affirmed by the Supreme Court of Georgia and from the ruling of the State Supreme Court plaintiffs in error now appeal.

FACTS OF THE CASE.

Complainants in Class A are merchandise brokers, or commission merchants representing exclusively non-resident principals.

Complainants in Class B, who are plaintiffs in error in this Court, are merchandise brokers or commission salesmen, representing both non-resident principals and resident principals; that is, they represent principals living entirely outside of the State of Georgia but also represent some principals residing in Georgia. They maintain an office in the City of Atlanta, and each represents a specific party or parties called their principals; most of whom are non-residents. They solicit orders from the wholesale merchants and jobbers, which orders when received, are transmitted to their respective principals, and upon acceptance

of their orders, the goods are shipped directly from the principals to the purchaser. Complainants receive a small brokerage or commission on all orders that are sold by them, and accepted by the seller, after the goods have been shipped and paid for. They do not receive any pay from any buyer, nor do they represent any person in Georgia other than their specific principals, nor do they represent or hold themselves out as representing the public in general. Complainants are the sole representatives of the principals whom they represent in the City of Atlanta. A very large majority of the principals represented by complainants are non-residents living outside of the State of Georgia. The goods which are sold by complainants are shipped by these non-resident principals to the buyer in the State of Georgia.

Complainants represent a few Georgia principals but the business done for the Georgia principals is a very small part of their entire business; most of the business being that done for non-resident principals.

BRIEF OF LAW AND ARGUMENT.

It is contended by the plaintiffs in error as follows:

A. The tax act which plaintiffs in error are seeking to enjoin is a general tax measure directed against all of the brokers in the State of Georgia and all of the business done by said brokers regardless of whether the business is interstate or intrastate and that said act is void as being an imposition on interstate commerce for the reason that said act does not separate or discriminate the intrastate business from the interstate business.

Judge Cooley, on taxation, Volume 1, 3rd Edition, page 161, deals with this point as follows:

> "Although a company or corporation is engaged in interstate commerce, it may nevertheless be taxed upon all local business, BUT, in the imposition of such a tax the interstate business must be discriminated from the intrastate business, or it must be capable of such discrimination so that it may clearly appear that the intrastate business alone is taxed."

The tax act of Georgia does not make any discrimination or separation between interstate business and intrastate business done by complainants in Class B, nor is the act capable of having such discrimination deduced from its language. The act is directed against ALL the business, both the interstate and intrastate business.

In the case of Webster vs. Beall, 68 Federal, 183, the following ordinance of the City of Alexandria, Virginia, was attacked by an express company as being an imposition by the municipality of a tax on interstate commerce:

> "On every express company having an office in the City of Alexandria, Virginia, and receiving goods, wares, and merchandise, and forwarding them to points within the City of Alexandria, and delivering them in the City of Alexandria, there shall be levied and collected, a license tax of $150.00."

Circuit Judge Simmonton, begins on page 184, as follows:

> "Is this ordinance of the City of Alexandria a regulation of or a tax upon commerce between the States? There can be no question that a state and municipality, corporated within a state, acting under state authority, can impose a license upon all business conducted by common carriers within the state, citing Western Union Telegraph vs. Texas, 105 U. S. 460, and other citations, BUT, in the imposition of such tax, the interstate business must be discriminated from the intrastate business, or it must be made capable of such discrimination so that it may clearly appear that the intrastate business alone is taxed, citing Hatterman vs. Telegraph Company, 127 U. S. 411, and others. Does the ordinance in question make such discrimination or can such discrimination be made under its terms? The tax is on every express company having an office in the City of Alexandria, and receiving goods, etc., and forwarding them to points within the State of Virginia. Receiving the goods from what points? Evidently from any quarter within or without the state, for the next sentence is 'or receiving goods, wares and merchandise within the State of Virginia, and delivering them in the City of Alexandria.' This is a description of the business taxed. It includes all the business of the express company and on that business imposed a tax of $150.00. The tax is not confined

to such business as it does within the State of Virginia, nor is there any distinction between business done within the state and that done without the state. If the express company does any business within the State of Virginia, and has an office in Alexandria, and thus within the reach of the taxing power, it is made to pay on the whole business of receiving and forwarding, from whatever points, the tax of $150.00. The distinction here drawn is illustrated in the case of Express Company vs. Seibert, supra."

The learned judge concludes the opinion on the bottom of page 185, as follows:

"The ordinance of the City of Alexandria makes no discrimination whatever between the business done without and within the state, but imposes a tax on the company if it has an office in the city and if some of its business is between points in the State of Virginia is repugnant to the interstate commerce law, and is void."

Also see United States Express Company vs. Hemmingway, Treasurer, 39 Federal, 62.

In the case of Leloup vs. Port of Mobile, 127 U. S. 647, in dealing with the point in question, the Chief Justice says:

"But it is urged that a portion of the telegraph business is internal to the State of Alabama, and, therefore, taxable by the state, but that fact does not remove the difficulty. The tax affects the WHOLE business without discrimination. There are sufficient modes in which the interstate business may be taxed without the imposition of the tax which covers the entire operation of the company."

Also see 132 U. S., 477.

In the case of the Postal Telegraph Company vs. Mayor and Council of Cordele, 139 Ga., 126:

1. "Where a city ordinance laid a tax of $100.00 on every telegraph company doing business within the city, or in lieu thereof, required such companies to pay $2.00 for each and every pole within the city limits, which tax affected the ENTIRE business of such companies, both interstate and domestic. Such an ordinance is unconstitutional and void, as against a company doing interstate business."

In recent decisions from this Court the principle in the Leloup case has been followed in the following cases, to-wit:

Ureka Pipe Line Company vs. Hallahan, reported in Advance Opinions of the Supreme Court, July 16th, 1922.

In the case of W. H. Phipps vs. The Cleveland Refining Company, reported in Advanced Opinions of the Supreme Court, dated May 1, 1923.

B. The Court held that complainants in Class A were exempt from the operation of the tax, because they were dealing in interstate commerce, but that complainants in Class B are subject because they represent some domestic principals. This decision results in a discrimination as against members of the same class. It is legal and proper to make classifications for the purpose of different taxation, but there must be some reasonable basis upon which the classification is made. If the act was directed against all of the brokers, as claimed by plaintiffs in error, the ruling of the Court exempting those who deal in interstate commerce results in the lack of uniformity and is a discrimination against those brokers who represent non-resident and domestic principals. If the act is only directed at those brokers who represent non-resident and domestic principals, as claimed by defendants in error, the act would, in itself, be a discrimination on the part of the Legislature against citizens of Georgia in favor of non-resident citizens. So that it matters not which way defendants in error undertake to construe the act, it results in the lack of uniformity and discrimination, and would be void, because it is in derogation of the Fourteenth Amendment to the Constitution, which guarantees that each state shall give the equal protection of the laws to its citizens.

This very interesting point has been dealt with in full by the Supreme Court of Vermont. A license tax was imposed on all peddlers in the State of Vermont selling goods, wares and merchandise.

In the case of the State vs. Pratt, 59 Vermont, 590, the attack was made that the act was a burden on interstate commerce when directed against those peddlers selling merchandise manufactured in foreign countries. The act was

held unconstitutional as being an interference with interstate commerce. The Legislature of Vermont amended the tax act and imposed a license on any person selling goods, wares, or merchandise, which were manufactured in the "State of Vermont." The amended act was attacked on the ground that it was a violation of the Fourteenth Amendment of the United States Constitution in that it discriminated in favor or non-resident citizens of Vermont.

In the case of the State vs. Holt, 71 Vt., 59 (42 Atlantic 975), Judge Rowell delivering the opinion in both cases, says:

> "Under the rule it seems impossible to make a classification here, for want of sufficient ground on which to base it. It cannot be based on any difference in the goods themselves, for they are precisely alike; nor on the fact that they were made in different states, that bears no just and proper relation to a classification, but is purely arbitrary. It cannot be based on public policy, for it is not reasonable to say that it is for our interest to encourage the introduction and sale of the goods of the non-resident manufacturer, when thereby the manufacture and sale of the goods of the resident manufacturer would be discouraged, and perhaps prevented altogether. Nor can it be based on the difference of residence of the manufacturers; for that, as in case of the goods, would be purely arbitrary, and, besides, would allow a state to discriminate against its own citizens in favor of the citizens of other states, which it cannot do, any more than it can discriminate in favor of its own citizens against the citizens of other states, for the equality clause of said amendment includes everybody. No state shall 'deny to any person within its jurisdiction the equal protection of the laws,' is its language, and its universality of inclusion has been often adjudged. Yick Co. vs. Hopkins, 118 U. S. 357, 369; 6 Sup. Ct. 1064. If a classification can be based on none of these grounds, we see no ground on which it can be based."

It cannot be argued that the Vermont statute is not analogous to that section of our general tax act which is now under consideration, although the Vermont statute particularly specifies in its amended form "goods manufactured within the state."

An express prohibition against legislation is no more effectual than a prohibition by implication. In the case of Cain vs. Smith, 117 Ga. 902 (1), "prohibition against legisation which result by implication are equally as effectual as when they are expressed and are to be regarded in the one case no less than in the other."

If the complainants in Class A are not subject to the tax act because it would be unconstitutional for the state to impose tax burdens on interstate commerce, then the statute must read by implication that brokers representing manufacturers within the state are to pay a license of $100.00. Under the Vermont authority just quoted, the section is void, as being a violation of the Fourteenth Amendment to the Federal Constitution.

C. The question of tax confiscation was very slightly urged on the hearing before the State Supreme Court, but since the decision of that Court holding that the act is valid as against brokers doing both an interstate and intrastate business, meaning of course that the tax must be on business exclusively intrastate, then the question of excessive taxation arises. To tax a broker $100.00 per year for a few sales that he makes for resident principals, where the petition shows that he makes only a small brokerage or commission on his entire business; would be in effect a confiscation of his property. The exact amount of business done for resident principals is not shown in the record but the petition does show that the business done for domestic principals is small compared to that done for foreign principals. The question arises upon the decision of the State Supreme Court as to whether or not the tax of $100.00 on the intrastate business is reasonable.

See Postal Telegraph Co. vs. Cordele, 141 Ga. 558
Western Union Tel. Co. vs. Fitzgerald, 149 Ga. 330
Sou. Express Co. vs. Ty Ty, 141 Ga. 421.

Respectfully submitted,

E. B. WEATHERLY,
JOHN P. ROSS.

J. E. RALEY & BROTHERS, ET AL. *v.* RICHARDSON, TAX COLLECTOR OF FULTON COUNTY, ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF GEORGIA.

No. 152. Submitted January 11, 1924.—Decided February 18, 1924.

1. The validity of a flat tax imposed by a state law upon brokers or commission merchants who solicit orders for goods in intrastate

commerce, is not affected by the fact that the persons taxed are engaged also, and to a greater extent, in soliciting orders in interstate commerce. P. 159.

2. Because a state tax on merchants engaged in domestic business is not and cannot be imposed on others engaged in interstate business, is manifestly no reason for thinking it repugnant to the Equal Protection Clause. P. 160.

154 Ga. 140, affirmed.

ERROR to a judgment of the Supreme Court of Georgia affirming a judgment dismissing a bill to enjoin collection of a tax.

Mr. E. B. Weatherly and *Mr. John P. Ross* for plaintiffs in error.

Mr. Geo. M. Napier, Attorney General, *Mr. T. R. Gress*, Assistant Attorney General, of the State of Georgia, and *Mr. Frank Carter* for defendants in error.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

A statute of Georgia (Acts 1921, p. 46, par. 30) imposes a flat tax of $100 upon any broker or commission merchant buying or selling merchandise on commission for another, or engaged in the business of receiving or distributing articles of merchandise shipped to such broker or merchant for distribution on account of the shipper. The bill filed below sought to enjoin the collection of the tax on the ground that the statute violates the Commerce Clause of the Federal Constitution and also, contingently, upon the further ground that the statute is void under the equal protection clause of the Fourteenth Amendment.

The complainants were divided into two classes, A and B. The business of those in Class B was to solicit orders for goods from dealers in Georgia, which orders were sent to be filled, sometimes to non-resident and sometimes to resident principals, the greater part of the business being with non-resident principals. The business of those in

Class A was wholly confined to representation of non-resident principals. Upon acceptance of an order the goods are shipped by the principal to the purchaser, but remain the property of the former until the time of sale.

The trial court sustained the tax as to Class B and enjoined its collection as to Class A, and its judgment was affirmed by the Supreme Court. 154 Ga. 140. We are concerned here with the judgment only in so far as it affects Class B.

The contention is that the tax is laid, expressly, upon all brokers and commission merchants in the State and upon the business done by them, whether interstate or intrastate, without separating one from the other. The state courts, by whose construction we are bound, held that the statute did not apply to interstate business; and we consider it as though it so provided in terms. It was held, however, that inasmuch as Class B complainants were engaged in intrastate business they were subject to the tax, and none the less because they were also engaged in interstate business. With this conclusion we fully agree.

The complainants were definitely engaged in the domestic business described in the statute and were liable to the tax, irrespective of the extent of it and whether they engaged in interstate business in addition or not. That the former was small in comparison with the latter makes no difference; nor does the fact that both were carried on at the same time and in the same establishment. If the two were not distinct, but the former a mere incident of the latter, the burden was upon complainants to furnish the proof; in which case a different question would arise. *Kehrer* v. *Stewart,* 197 U. S. 60, 69. Certainly, one cannot avoid a tax upon a taxable business by also engaging in a non-taxable business.

There is nothing in the contention that, because, under the construction placed upon the statute by the state

courts, the tax falls upon those engaged in domestic business and does not fall upon those engaged in interstate business, it is void for inequality. It would be a strange application of the equality provision of the Fourteenth Amendment to say that because a State is forbidden by paramount law to impose a tax upon some merchants, it is therefore powerless to impose it upon other merchants to whom the restriction does not apply. It is enough if the State observe the rule of equality among the persons subject to its taxing power.

Affirmed.

FEDERAL RESERVE BANK OF RICHMOND